DOCUMENT RESUME

ED 470 984 IR 021 906

AUTHOR	Russell, Carrie
TITLE	New Copyright Exemptions for Distance Educators: The Technology, Education and Copyright Harmonization (TEACH) Act. ERIC Digest.
INSTITUTION	ERIC Clearinghouse on Information and Technology, Syracuse, NY.
SPONS AGENCY	Office of Educational Research and Improvement (ED), Washington, DC.
REPORT NO	EDO-IR-2002-10
PUB DATE	2002-12-00
NOTE	4p.; For legislative hearing, "Technology, Education and Copyright Harmonization Act of 2001. Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary on S. 487. House of Representatives, One Hundred Seventh Congress, First Session," see ED 456 838. For full text: http://commdocs.house.gov/committees/judiciary/hju73473.000/hju73473_0f.htm.
CONTRACT	ED-99-CO-0005
AVAILABLE FROM	ERIC Clearinghouse on Information & Technology, Syracuse University, 621 Skytop Rd., Suite 160, Syracuse, NY 13244-5290. Tel: 315-443-3640; Tel: 800-464-9107 (Toll Free); Fax: 315-443-5448; e-mail: eric@ericit.org. For full text: http://ericit.org.
PUB TYPE	ERIC Publications (071) -- ERIC Digests in Full Text (073)
EDRS PRICE	EDRS Price MF01/PC01 Plus Postage.
DESCRIPTORS	Access to Education; Access to Information; *Copyrights; Distance Education; Educational Resources; Fair Use (Copyrights); *Federal Legislation; Information Technology; Instructional Materials; *Intellectual Property
IDENTIFIERS	Digital Data; *Digital Technology; ERIC Digests

ABSTRACT

With the recent passage of a new law eagerly-awaited by educators, the same type of copyright protected materials that a teacher would ordinarily use in the physical classroom can now--in general--be used in the digital classroom. The "Technology, Education and Copyright Harmonization (TEACH) Act," which President Bush signed into law on November 2, 2002, amends two sections of the U.S. copyright law that educators rely on when using copyrighted materials in the classroom without prior permission from the copyright holder (Section 110 on exemption for performance and displays and 112 on exemption for ephemeral recordings). TEACH expands existing exemptions to allow for the digital transmission of copyrighted materials, including on Web sites, so they may be "viewed" by enrolled students. However, in order to take advantage of the exemptions, educational institutions must meet specific obligations outlined in the law. This ERIC Digest outlines both the privileges and the requirements of TEACH. (Author)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 470 984

New Copyright Exemptions for Distance Educators

THE TECHNOLOGY, EDUCATION AND COPYRIGHT HARMONIZATION (TEACH) ACT

By Carrie Russell

IR021906

BEST COPY AVAILABLE

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

ERIC

ERIC Digest

DECEMBER 2002

ERIC CLEARINGHOUSE ON INFORMATION & TECHNOLOGY AT SYRACUSE UNIVERSITY
621 SKYTOP ROAD, SUITE 160
SYRACUSE, NEW YORK 13244
WWW.ERICIT.ORG

EDO-IR-2002-10

New Copyright Exemptions for Distance Educators

THE TECHNOLOGY, EDUCATION AND COPYRIGHT HARMONIZATION (TEACH) ACT

By Carrie Russell

With the recent passage of a new law eagerly-awaited by educators, the same types of copyright protected materials that a teacher would ordinarily use in the physical classroom can now--in general--be used in the digital classroom. The "Technology, Education and Copyright Harmonization (TEACH) Act," which President Bush signed into law on November 2, 2002, amends two sections of the U.S. copyright law that educators rely on when using copyrighted materials in the classroom without prior permission from the copyright holder (Section 110 on exemption for performance and displays and 112 on exemption for ephemeral recordings). TEACH expands existing exemptions to allow for the digital transmission of copyrighted materials, including on Web sites, so they may be "viewed" by enrolled students. However, in order to take advantage of the exemptions, educational institutions must meet specific obligations outlined in the law. This ERIC Digest outlines both the privileges and the requirements of TEACH.

Mediated Instructional Activities

TEACH changes a fundamental aspect of public performance and display exemptions by recognizing that, in the digital environment, enrolled students may take courses or receive course-related materials outside of the physical classroom. Students may receive materials at home on their desktop, from another educational institution located elsewhere in the country, or in the school's computer center. The exemptions, however, only apply to "mediated instructional activities." Mediated instruction, according to the Senate Report (S. Rep. No. 31, 107th Cong.,1st Sess., 2001) refers to "activities that use copyrighted materials ... *integral* to the class experience, controlled by or under the *actual supervision of the instructor* and *analogous to the type of performance and display that would take place in a live classroom.*"

Only non-profit, accredited educational institutions can take advantage of these exemptions. For-profit courses would not apply. Accredited institutions are post-secondary institutions that are accredited by a regional or national accreditation agency recognized by the Council on Higher Education or the United States Department of Education. Elementary and secondary schools must be recognized by their applicable state certification board or licensing process in order to take advantage of TEACH.

New Exemptions

Copyright holders enjoy exclusive rights of copyright (17 U.S.C. § 106), that is only they have the statutory right to exercise a copyright, such as the right to create derivative works or the right to publish and distribute works. But the law also carves out numerous exemptions that allow users of copyrighted materials the privilege of exercising a copyright under certain conditions. Without these copyright exemptions, copyright holders would enjoy a complete monopoly over the use of their works, which would restrain the purpose of the copyright law--"to advance the progress of Science and the Useful Arts" (U.S. Const. art. I § 8, cl. 7). The TEACH Act allows educators the right to exercise two exclusive rights of copyright: the right of public performance and the right of public display.

What Materials Can be Used?

The new legislation allows the display and performance of non-dramatic literary works (charts, journal and periodical articles, maps, some types of music, etc.), limited portions of dramatic literary works (those works that have a "story," such as plays, some motion pictures, operas, etc.) and *any work* in ways that would typically occur in the physical, live classroom. Dramatic literary works have always been a problematic category since feature motion pictures are included in this category. The motion picture industry has been hesitant to loosen up restrictions on dramatic literary works for educational purposes, but the new law does allows that portions of these works can be used in courses. Since the law leaves open the possibility that any work may be displayed (whether in part of in its entirety), educators could show an entire dramatic literary work in a mediated instructional environment, if that work is *necessary* for the course. For example, film history courses may require that an entire film be viewed.

Materials that Cannot Be Used

Works that are produced for the sole purpose of being used in distance education (digital courses available for purchase) are not included in TEACH. These works have a clearly established market and should be lawfully acquired. In addition, educators cannot use materials in the digital classroom in order to avoid purchase. Students enrolled in the class must purchase required reading, such as textbooks, course packs and consumable workbooks. However, a teacher may choose to use a small portion from required course materials in the digital classroom, such as a graph that appears in the purchased textbook. Furthermore, TEACH reminds educators that they should not use copies of works that are unlawfully made, such as pirated copies of music or films downloaded from peer-to-peer file sharing sources. Finally, a note about course reserves: Under the new law, course reserves (whether in electronic or print form) are considered "supplemental course resources" and are not applicable to the TEACH exemptions. This does not mean that course reserves are unlawful or cannot be used for teaching. It only means that under TEACH, reserve materials are not considered "required" or essential to the mediated instructional activities described in TEACH.

Ephemeral Copies

TEACH also allows educators to copy an analog work to a digital format for use in the classroom without the prior permission of the copyright holder when a digital version of the work is not available or when a digital version exists, but cannot be used because of technological con-

CARRIE RUSSELL *is copyright specialist for the American Library Association's Office for Information Technology Policy.*

trols that block access. Only the portion of the work necessary to meet the pedagogical need should be converted to the digital format. The digitized copy cannot be shared with other institutions and no further copies can be made.

Retention of Copyright Protected Works for the Instructional Session

All copyrighted works used for mediated instructional activities should be retained only for as long as necessary, that is however long it may take to accomplish the pedagogical goals of the class session. For some courses, teachers may need to make copyrighted works available to the students throughout the course. Others may find it more conducive to their teaching method to have copyrighted materials available for shorter periods of time. *The law is not specific about how long a class session might be.* This lack of clarity in the law allows educational institutions some latitude on how they might describe a "session." For college courses, that session might be the semester, for others a session might be a week or a day. Needless to say, educational institutions should not take unreasonable advantage of the ambiguous "class session" term and should act in the spirit of the law.

Institutional Obligations

Educational institutions should not jump head first into applying TEACH exemptions without considering and addressing important institutional requirements. These duties can be categorized in two groups: copyright education and technological protection of copyrighted works.

Educational institutions must have in place a copyright policy and copyrighted educational materials for teachers, staff and students. Congress recognized that many people do not understand copyright law and what activities are or are not lawful. While the true test of infringement can only be adjudicated in the courts, institutions can go a long way in providing and promoting copyright policies and other materials to their communities. The law does not define what should be included in institutional policies, but does state that the policies should be accurate, promote lawful behavior, and provide notice to students that materials used in class may be protected by copyright.

In the best of circumstances, copyright policies should be created with a wide variety of input from all stakeholders so that all concerns and ideas are heard and considered. Faculty, teachers, and (yes) students should be included since they are the users of copyrighted materials in the class. Librarians and media specialists should also be included because they retain copyrighted works, assist faculty with course materials and tend to know the most about the copyright law at the institution. It would be unfortunate if policies and educational materials were created in a vacuum or drafted by legal counsel without input. Legal counsel often takes an overly strict approach to copyright law, which is understandable since its main purpose is avoiding litigation. But it should be recognized that educational institutions have been allowed special and specific allowances in the copyright law since they are so essential to the progress of science and the useful arts. If your school or college already has a copyright policy, it would be a good idea to review the policy and update educational materials to include TEACH allowances and requirements. Any institution that does not have a copyright policy and informational materials on copyright cannot take advantage of the TEACH exemptions.

The second institutional obligation is a tougher nut to crack and will depend on the approach taken by and resources available to the educational institution. TEACH requires that only enrolled students have access to works protected by copyright. In addition, TEACH requires that the educational institution employ technological protection measures to prevent the further copying and distribution of the copyrighted works used in the digital class. Of course, it is not feasible to *guarantee* that works will not be copied or distributed, there is no known technology that can achieve this. However, institutions should use all means at their disposal to control access, copying and distribution. Currently many schools, colleges and universities use "password protection" to control access to course materials. Some institutions also use various authentication tools, such as student "PINs" (personal identification numbers) required for school enrollment. For example, a student cannot register for a class unless they have a PIN that ensures they are officially recognized by the institution and enrolled.

The law does not specify how far an institution should go to protect works, but certainly as much as can possibly be done should be pursued. Available resources affect the choices that institutions make in this regard. As technology advances and as the market for protecting technology develops, one can expect that there will be more technology solutions for institutions to consider. Ultimately, institutions will have to make a decision if they believe the technological protection mechanisms available to them are sufficient to reasonably protect copyrighted works. If the institution does not feel confident with its technology solution, that institution cannot take advantage of the TEACH exemptions according to the law.

Fair Use Continues to be an Option

The TEACH exemptions do not rule out the possibility of using "fair use" as a rationale for the display and public performance of copyright protected works in the digital classroom. This means that if TEACH exemptions do not go far enough in allowing the use of materials in the class, fair use can be considered and *may* justify the use. In addition, if your institution cannot meet the requirements of TEACH – both the development of copyright policies and informational materials *and* a reasonable means to protect access, copying and further distribution of copyrighted works – the institution may choose to bypass the TEACH exemptions. Fair use may apply for the use of copyrighted materials in distance education.

Conclusion

Institutions will, over time, decide how they choose to react to TEACH exemptions and requirements. Technology will develop and course management software programs like WebCT and Blackboard may provide "copyright protection mechanisms" as part of their products. Best practices for the implementation of TEACH will provide models for other institutions to consider. And, as in the past, fair use will continue to be the key copyright exemption for educational institutions.

References and Further Resources

Crews, K. D. (2002). New copyright law for distance education: The meaning and importance of the TEACH Act. Washington, D.C.: American Library Association. Available online: www.ala.org/washoff/teach.html

Gasaway, L. (2001). Balancing copyright concerns: The TEACH of 2001. *Educause Review, 36* (6), 82-83. Available online: http://www.educause.edu/ir/library/pdf/erm01610.pdf

Report on Copyright and Digital Distance Education. U.S. Copyright Office. Available online: http://www.copyright.gov/disted/

Technology, Education, and Copyright Harmonization Act of 2002. U.S. Copyright Office. Available online: http://www.copyright.gov/legislation/pl107-273.html#13301

ERIC Digests are in the public domain and may be freely reproduced and disseminated.

This publication is funded in part with Federal funds from the U.S. Department of Education under contract number ED-99-CO-0005. The content of this publication does not necessarily reflect the views or policies of the U.S. Department of Education nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. government. Visit the Department of Education's Web site at: www.ed.gov

U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)

NOTICE

Reproduction Basis

	This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.
X	This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").